

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

ELISANDRO MENDOZA,

Plaintiff,

v.

STEFANIE HUMPHREY, *et al.*,

Defendants.

3:09-cv-00717-LRH-VPC

**REPORT AND RECOMMENDATION  
OF U.S. MAGISTRATE JUDGE**

January 25, 2011

This Report and Recommendation is made to the Honorable Larry R. Hicks, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4. Before the court is defendants' motion to dismiss (#26).<sup>1</sup> Plaintiff opposed (#35), and defendants replied (#36). The court has thoroughly reviewed the record and recommends that defendants' motion to dismiss (#26) be granted.

**I. HISTORY & PROCEDURAL BACKGROUND**

Plaintiff Elisandro Mendoza ("plaintiff"), a *pro se* inmate, is currently incarcerated at Lovelock Correctional Center ("LCC") in the custody of the Nevada Department of Corrections ("NDOC") (#11). Plaintiff brought his original action pursuant to 42 U.S.C. § 1983, alleging that defendants retaliated against him for filing grievances and failed to protect him from a violent attack while he was incarcerated at Warm Springs Correctional Center ("WSCC") in violation of the First, Eighth, and Fourteenth Amendments.<sup>2</sup> *Id.* Specifically, plaintiff claims that while working in the kitchen at the WSCC, he noticed that the food being served to inmates was often old and expired. *Id.* at 3. Plaintiff believed this to be wrong and took the expiration tags off the food containers and sent them to the Mexican consulate's offices and his habeas corpus attorney. *Id.* On or about

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<sup>1</sup> Refers to the court's docket numbers.

<sup>2</sup> Plaintiff's Fourteenth Amendment claims were dismissed with prejudice upon screening of his complaint pursuant to 28 U.S.C. § 1915A (#11).

1 January 16, 2009, plaintiff states that he was fired by John Doe #2, who said she was going to talk  
2 to defendant Humphrey to have him “silenced on the matter.” *Id.* at 4. Plaintiff claims that on or  
3 about August 11, 2009, “[he] was walking to canteen and saw Warden Humphreys [sic] talking to  
4 three inmates . . . [he] saw her pumping her fist and heard her tell these inmates [his] first and last  
5 name.” *Id.* Later that week, on or about August 17, 2009, plaintiff was walking by unit two when  
6 he was grabbed by several inmates and beaten. *Id.* The inmates yelled, “this is from the warden,”  
7 and they told plaintiff that defendant Humphrey requested that they beat him. *Id.* Plaintiff asserts  
8 that John Does 1, 3, and 4 turned a “blind eye” to the situation by allowing the inmates to beat him  
9 without intervening. *Id.* at 6. Plaintiff claims that he has ongoing physical and mental pain from the  
10 incident. *Id.* Plaintiff seeks compensatory and punitive damages, as well as declaratory and  
11 injunctive relief. *Id.* at 11.

12 Defendants filed a motion to dismiss plaintiff’s complaint for failure to exhaust his  
13 administrative remedies pursuant to the Prison Litigation Reform Act (“PLRA”) and Administrative  
14 Regulation (“AR”) 740 (#26). Defendants claim that plaintiff filed an informal grievance about the  
15 assault on August 27, 2009. *Id.* at 3. The grievance form stated that he “was brutally beaten by 5  
16 Mexican inmates” and that he heard one inmate say “we do this because lady warden says so” (#26-  
17 3, p. 3). Defendants note that plaintiff’s grievance form did not identify his attackers and did not  
18 mention that he believed the attack was in retaliation for reporting that WSCC served expired food.  
19 *Id.* Pursuant to AR 740, NDOC officials referred the matter to the Inspector General’s (“IG”) office  
20 for review because the grievance alleged misconduct by an employee (#26, p. 3). NDOC responded  
21 to plaintiff’s grievance stating: “[Y]our informal grievance has been referred to the Inspector  
22 General’s office for review and as such, all time frames are suspended until disposition is received”  
23 (#26-3, p. 3).

24 Defendants explain that on December 3, 2009, plaintiff filed what he deemed a first level  
25 grievance. *Id.* However, the grievance suffered from procedural defects including: (1) the IG’s  
26 office had not yet completed its investigation so plaintiff’s informal level grievance had not yet been  
27 decided, and (2) plaintiff failed to attach a copy of the informal level grievance response to his first  
28 level grievance. *Id.* at 3-4. NDOC officials returned plaintiff’s first level grievance with a note

1 stating: “Did not attach required Informal level form with response, for review. Please re-submit  
 2 First Level with documents to process” (#26-3, p. 6). The form also includes the following warning:  
 3 “Failure to re-submit the grievance through the prescribed timeframe [sic] shall constitute  
 4 abandonment.” *Id.* Defendants provide plaintiff’s NOTIS report, which reveals that the IG’s office  
 5 completed its investigation on February 16, 2010. *Id.* at 3.

6 In plaintiff’s opposition he agrees that he filed an informal grievance and a level one  
 7 grievance regarding his attack (#35, p. 2). Plaintiff explains that during the grievance process he  
 8 “had the help of another inmate, because the plaintiff does not read or write in his own language, and  
 9 does not read, write or speak any [E]nglish.” *Id.* Plaintiff claims further that he was moved several  
 10 times during the grievance process due to “ongoing harassment” and for medical care. *Id.* Plaintiff’s  
 11 history of relocation is detailed in the offender information summary filed *in camera* by defendants  
 12 (#27-1 (*sealed*)). Plaintiff explains that by the time he was able to get help from another inmate to  
 13 continue the grievance process “it was to [sic] late to re-submit the level-1 grievance and he would  
 14 then file this Civil Rights Complaint . . . on 04/26/10 to try and resolve the issues that he has at the  
 15 Warm Springs Correctional Center.”<sup>3</sup> *Id.* at 3. In addition to the original informal grievance and  
 16 allegedly improper first level grievance provided by defendants, plaintiff also includes  
 17 documentation of a second informal grievance filed on November 12, 2009. *Id.* at 12. Plaintiff  
 18 attaches NDOC’s response dated November 23, 2009, which deems the grievance improper and  
 19 states: “Already filed issue on grievance #20062880682, which was referred to the IG’s office for  
 20 review. *Id.*

21 The court notes that the plaintiff is proceeding *pro se*. “In civil rights cases where the  
 22 plaintiff appears *pro se*, the court must construe the pleadings liberally and must afford plaintiff the  
 23 benefit of any doubt.” *Karim-Panahi v. Los Angeles Police Dep’t*, 839 F.2d 621, 623 (9th Cir.  
 24 1988); *see also Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).

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 27 <sup>3</sup> Upon review of the docket for this matter, the court notes that plaintiff commenced this  
 28 lawsuit by filing an application for leave proceed *in forma pauperis* along with his initial civil rights  
 complaint on December 8, 2009 (#1), approximately five days after filing his first level grievance. Plaintiff  
 filed his first amended complaint on April 26, 2010 (#11).

## II. DISCUSSION & ANALYSIS

### A. Discussion

Failure to exhaust is an affirmative defense under the PLRA rather than a jurisdictional requirement, and defendants bear the burden of raising and proving that the plaintiff has not exhausted. *Jones v. Bock*, 549 U.S. 199, 216 (2007); *Wyatt v. Terhune*, 315 F.3d 1108, 1117 n.9 (9th Cir. 2003), *cert denied*, 540 U.S. 810 (2003). Inmates are not required to specifically plead or demonstrate exhaustion in their complaints; rather, it is the defendant's responsibility to raise the issue in a responsive pleading. *Jones*, 549 U.S. at 216.

Failure to exhaust is treated as a matter in abatement, not going to the merits of the claim, and is properly raised in an unenumerated Rule 12(b) motion. *Wyatt*, 315 F.3d at 1119. The court may look beyond the pleadings and decide disputed issues of fact without converting the motion into one for summary judgment; however, "if the district court concludes that the prisoner has not exhausted nonjudicial remedies, the proper remedy is dismissal of the claim without prejudice." *Id.* at 1119-20, *as noted in O' Guinn v. Lovelock Corr. Ctr.*, 502 F.3d 1056, 1059 (9th Cir. 2007); *see also, Rizta v. Int'l Longshoremen's & Warehousemen's Union*, 837 F.2d 365 (9th Cir. 1988) ("[F]ailure to exhaust nonjudicial remedies should be raised in a motion to dismiss, or be treated as such if raised in a motion for summary judgment.").

#### 1. Prison Litigation Reform Act of 1996

The PLRA amended 42 U.S.C. § 1997e to provide that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a).

Although once within the discretion of the district court, the exhaustion of administrative remedies is now mandatory. *Booth v. C.O. Churner*, 532 U.S. 731 (2001). Those remedies "need not meet federal standards, nor must they be 'plain, speedy, and effective.'" *Porter v. Nussle*, 534 U.S. 516, 524 (2002) (citing *Booth*, 532 U.S. at 739-40 n.5). Even when the prisoner seeks remedies not available in the administrative proceedings, notably money damages, exhaustion is still required prior to filing suit. *Booth*, 532 U.S. at 741. Recent case law demonstrates that the Supreme Court

1 has strictly construed section 1997e(a). *Id.* at 741 n.6 (“We will not read futility or other exceptions  
2 into statutory exhaustion requirements where Congress has provided otherwise.”).

3 Plaintiffs must properly exhaust nonjudicial remedies as a precondition to bringing suit. The  
4 PLRA requires “proper exhaustion,” meaning that the prisoner must use “all steps the agency holds  
5 out, and doing so *properly* (so that the agency addresses the merits).” *Woodford v. Ngo*, 548 U.S.  
6 81, 89 (2006). Requiring exhaustion prior to filing suit furthers the congressional objectives of the  
7 PLRA as set forth in *Porter v. Nussle*, 534 U.S. 516, 524-25. *See id.* at 1200.

## 8 2. NDOC Procedures

9 “Applicable procedural rules [for proper exhaustion] are defined not by the PLRA, but by  
10 the prison grievance process itself.” *Jones*, 549 U.S. at 218.

11 The NDOC grievance procedure is governed by AR 740 (#26-2). Defendants attach to their  
12 motion the relevant version of AR 740, which was in effect at the time plaintiff filed his grievance.  
13 *Id.* In order for plaintiff to exhaust available remedies at the time of his injury, AR 740 required the  
14 following: (1) an informal review level, which “shall be reviewed and responded to by the inmate  
15 assigned caseworker” in consultation with other appropriate staff; (2) a first level formal grievance,  
16 which “shall be reviewed and responded to by the Warden;” and (3) a second level grievance, which  
17 “shall be reviewed and responded to by either the Assistant Director of Operations, Assistant  
18 Director of Support Services, Offender Management Administrator, Medical Director, or  
19 Correctional Programs Administrator.” *Id.* at 11.

20 Once received, NDOC logs informal grievances into a tracking system. *Id.* at 15. The  
21 caseworker assigned to the informal level grievance will provide the inmate with a response within  
22 twenty-five days, unless more time is required to conduct further investigation. *Id.* For cases in  
23 which an inmate alleges staff misconduct, the case is forwarded to the Office of the Inspector  
24 General for review and the informal grievance response reflects this action. *Id.* at 16. In this case,  
25 “[t]imeframes [sic] are suspended until a disposition is received from the Inspector General’s  
26 Office.” *Id.* If the inmate is not satisfied by NDOC’s response to his informal grievance, he may  
27 appeal the decision within five days by filing a first level grievance. *Id.* at 16-17. NDOC will  
28 provide a response within twenty days of receipt of the first level grievance. *Id.* at 17. Finally, if the

1 inmate is not satisfied with the first level grievance outcome, he may file a second level grievance,  
2 to which the NDOC will respond within twenty days. *Id.* at 17-19. Upon completion of the  
3 grievance process, inmates may pursue civil rights litigation in federal court.

4 **B. Analysis**

5 Defendants argue that plaintiff failed to exhaust his administrative remedies with respect to  
6 all claims (#26). Specifically, defendants assert that plaintiff properly filed an informal level  
7 grievance, which was forwarded to the IG's office for investigation, but that he subsequently filed  
8 an improper first level grievance that did not include the disposition of the informal level grievance  
9 because it had not yet been rendered by the IG's office. *Id.* at 3-4. Defendants note that plaintiff did  
10 not refile a first level grievance thereby abandoning his claim. *Id.* at 4. Plaintiff argues that he  
11 "tr[ie]d to follow all the rules applying to the grievance process," but that due to several transfers and  
12 unit moves, he ran out of time to resubmit his first level grievance (#35, p. 2-3).

13 Based on the facts before the court, defendants met their burden of proving that plaintiff has  
14 not exhausted his remedies. Defendants and plaintiff provide copies of two informal level  
15 grievances and one first level grievance. The parties seem to agree that NDOC officials forwarded  
16 the initial informal level grievance to the IG's office for investigation and that the subsequent  
17 informal and first level grievances were improper. The IG's investigation was ongoing at the time  
18 plaintiff filed these follow-up grievances, which rendered plaintiff's second informal grievance  
19 duplicative and his first level grievance premature. Plaintiff's sole argument as to why this court  
20 should consider him to have fully exhausted his grievances is that he moved several times during the  
21 pendency of his initial informal grievance. Because plaintiff is not a native English speaker, he  
22 requires the assistance of other inmates in order to prepare his grievance forms, and presumably his  
23 court filings. Plaintiff seems to argue that due to several moves, he was unable to timely secure  
24 assistance to prepare and refile a first level grievance. The court rejects plaintiff's argument for three  
25 reasons.

26 First, NDOC notified plaintiff that while the IG's office investigated his claim all time frames  
27 associated with grievance filings were suspended. Therefore, prior to February 16, 2010, when the  
28 IG's office concluded its investigation, plaintiff did not have any time constraints. Second, plaintiff

1 filed his nonconforming first level grievance on December 3, 2009. NDOC responded to this  
2 grievance on December 16, 2009. Only five days after filing the first level grievance, plaintiff filed  
3 the initial complaint in this matter. Therefore, it is clear from this sequence of events that plaintiff  
4 not only declined to wait for the IG's office to conclude its investigation prior to proceeding with  
5 litigation; he also did not wait for the NDOC to respond to his first level grievance. Third, plaintiff's  
6 preparation of the complaint filed on December 8, 2009, is evidence that he was able to secure the  
7 assistance he needed in drafting court documents. The court concludes that if plaintiff could locate  
8 assistance for the purpose of filing a lawsuit, it is likely plaintiff could have used another or the same  
9 inmate to assist him with filing a conforming grievance upon conclusion of the IG's investigation.

10 Based on these facts and the sequence of events in this case, it is clear that plaintiff did not  
11 abide by the requirements provided in the PLRA or AR 740, which govern exhaustion of  
12 administrative remedies prior to filing a civil complaint. Therefore, defendants' motion to dismiss  
13 plaintiff's claims for failure to exhaust is granted.

### 14 III. CONCLUSION

15 Based on the foregoing and for good cause appearing, the court concludes that defendants  
16 met their burden of proving that plaintiff failed to exhaust his administrative remedies. Therefore,  
17 the court recommends that defendants' motion to dismiss(#26) be **GRANTED**. The parties are  
18 advised:

19 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of Practice,  
20 the parties may file specific written objections to this report and recommendation within fourteen  
21 days of receipt. These objections should be entitled "Objections to Magistrate Judge's Report and  
22 Recommendation" and should be accompanied by points and authorities for consideration by the  
23 District Court.

24 2. This report and recommendation is not an appealable order and any notice of appeal  
25 pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's judgment.

### 26 IV. RECOMMENDATION

27 **IT IS THEREFORE RECOMMENDED** that defendants' motion to dismiss (#26) be  
28 **GRANTED**.

**DATED:** January 25, 2011.

Valerie P. Cooke

**UNITED STATES MAGISTRATE JUDGE**